UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RESILIENT FLOOR COVERING PENSION FUND, et al., Plaintiff(s), v. M&M INSTALLATION, INC., et al, Defendant(s).	No. C08-5561 BZ **ORDER ON MOTIONS FOR ATTORNEYS' FEES AND MOTION TO AMEND JUDGMENT**

Before the court are two motions for attorneys' fees, one submitted by Plaintiffs and the other by Defendants, as well as Defendants' motion to amend the judgment. For the reasons set forth below, Defendants' motions are **DENIED** and Plaintiffs' motion is **GRANTED IN PART**.

Defendants' Motion for Attorneys' Fees

Defendants move for attorneys' fees under 29 U.S.C. section 1451(e).[1] That section commits the award of

[1] This section reads: "In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party."

attorneys' fees and costs to the discretion of the court.[2] The Ninth Circuit has set forth five factors to guide the district court's exercise of discretion: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. Hummell v. S. E. Rykoff & Co., 634 F.2d 446, 453 (9th Cir. 1980); see also Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491, 500 (9th Cir. 1987).

Considering these factors, I decline to award Defendants' attorneys' fees in this case. I cannot say that Plaintiffs acted culpably or that their positions must have appeared meritless to them or to their counsel when viewed prospectively rather than with the benefit of hindsight. As I pointed out in my order on the parties' cross-motions for summary judgment, the Ninth Circuit invited Plaintiffs, and

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[2] Awarding fees under this section is mandatory where a plan brings a successful action to collect unpaid employer withdrawal liabilities. Under ERISA, the award of attorneys' fees to a pension plan is mandatory in all actions to collect delinquent contributions. 29 U.S.C. § 1132(g)(2). The Ninth Circuit has held that this mandatory attorneys' fees provision applies in all actions to collect delinquent contributions owed under section 1145, including actions to collect unpaid employer withdrawal liabilities. Lads Trucking Co. v. Board of Trustees, 777 F.2d 1371, 1374 (9th Cir. 1985).

"encouraged" me, to address the issues of veil piercing and to determine whether Simas Floor was liable to Plaintiffs under section 1392(c) of the MPPAA for engaging in a transaction, a principal purpose of which was to "evade or avoid" withdrawal liability. (See Docket No. 124.) I cannot therefore say that Plaintiffs pursued these claims in bad faith. Moreover, Defendants' contention that there was "not a shred of evidence to support a veil piercing claim," is not true. Plaintiffs strongly argued that M & M was undercapitalized, a factor which often supports piercing a corporate veil. Defendants did not prevail on this issues; I merely concluded that there were disputed issues of fact that could not be resolved on summary judgment. It was not unreasonable for Plaintiffs to pursue a veil piercing claim based on the alleged undercapitalization of M & M by its parent company, whose shareholders were identical.

In addition, Plaintiffs' counsel has submitted a declaration stating that the Pension Fund has been certified as "in critical status" by its actuary since March 2010. I am therefore not persuaded that Plaintiffs could satisfy an award of attorneys' fees. Finally, the issue related to a benefit for all plan beneficiaries, a factor that favors Plaintiffs.

Moreover, even if some Hummell factors favored Defendants, Defendants would still not be entitled to attorneys' fees because no judgment has been entered in their favor as a "prevailing party" under section 1451. Defendants argue that since Plaintiffs lost on their veil piercing claim

against the individual Defendants, judgment should be entered in their favor and they should be entitled to fees as the prevailing party. I disagree. Plaintiffs won the ultimate issue, which is to compel the payment of the withdrawal liability, and are therefore the prevailing party. See Lads Trucking, 777 F.2d at 1375 ("[Pension Trust Fund] is the prevailing party; it won the ultimate issue; that it did not prevail on each and every sub-issue is not grounds for a piecemeal fees award."). Accordingly, Defendants' motion for attorneys' fees and their corresponding motion to amend the judgment are **DENIED**.

Plaintiffs' Motion for Attorneys' Fees & Costs

Where a plan successfully brings an action to collect unpaid employer withdrawal liabilities, an award of reasonable attorney's fees and costs is mandatory.[3] Lads Trucking, 777 at 1373-75. Plaintiffs sought and received a judgment for the full amount of withdrawal liability owed by Defendants, and are therefore entitled to reasonable attorneys' fees.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly

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[3] Neither Plaintiffs nor Defendants address the mandatory nature of attorneys' fees in withdrawal liability actions where the plan is successful. In light of the mandatory nature of an award of attorneys' fees in withdrawal liability actions, I will not address the factors set forth in Cuyamaca Meats, 827 F.2d at 500, as the parties have done. See also Operating Engineers' Pension Trust Fund v. Clark's Welding & Mach., Case No. 09-0044, 2010 U.S. Dist. LEXIS 50676, 2010 WL 1729475, at *5 (N.D. Cal. Apr. 27, 2010) ("When the Court awards withdrawal liability, an award of reasonable attorneys' fees is mandatory.")

rate." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). "The district court should also exclude from this initial fee calculation hours that were not 'reasonably expended'" such as "fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." Id. at 434. As recently emphasized by the Supreme Court:

> [T]rial courts need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection. So trial courts may take into account their overall sense of a suit, and may use estimates in calculating and allocating an attorney's time.

Fox v. Vice, 131 S. Ct. 2205, 2216 (2011).

With respect to the hourly rates sought by Plaintiffs, I find that, with the exception noted below, the rates are reasonable. Plaintiffs request $250 per hour for attorney time and $150 per hour for paralegal time. Plaintiffs submitted evidence showing that these attorney rates are in line with those prevailing in the marketplace. See, e.g., Clark's Welding & Mach., 2010 U.S. Dist. LEXIS 50676, 2010 WL 1729475 at *15-16 (attorney rates of $185 per hour and $255 per hour and paralegals at $110 per hour found reasonable in withdrawal liability action); Board of Trustees of the Boilermaker Vacation Trust v. Skelly, Inc., 389 F. Supp. 2d 1222, 1227-28 (N.D. Cal. 2005) (attorney rates of $210 per hour and $345 per hour found reasonable in delinquent contribution action). Defendants do not dispute the attorney hourly rates sought by Plaintiffs, but they do dispute the reasonableness of the paralegal hourly rates, arguing that an hourly rate of $115 is more in line with community standards.

(Def.'s Opp. Br. at 13.) I agree with Defendants that an hourly rate of $150 is on the higher end of the spectrum for paralegal rates in this district. See, e.g., Dist. Council 16 N. Cal. Health & Welfare Trust Fund v. Alvarado, Case No. 09-02552, 2011 U.S. Dist. LEXIS 39133, 2011 WL 1361572, at *16-17 (N.D. Cal. Apr. 11, 2011) (awarding $110 and $115 hourly rates for paralegals in action for unpaid contributions); Carpenters Pension Trust Fund for N. Cal. v. Lindquist, Case No. 10-3386, 2011 U.S. Dist. LEXIS 111731, 2011 WL 4543079 (N.D. Cal. Sept. 29, 2011) (same). There is support for awarding paralegals an hourly rate as high as $150, particularly where evidence is submitted that the paralegal is performing tasks akin to those of an attorney (see, for example, White v. Coblentz, Patch, Duffy & Bass LLP Long Term Disability Ins. Plan, 2011 U.S. Dist. LEXIS 125657, 2011 WL 5183854 (N.D. Cal. Oct. 31, 2011) and the cases cited therein), but Plaintiffs have submitted virtually no evidence to demonstrate that the paralegals who performed work in this action should be billed out at rates on the higher end of the spectrum. The only information provided about the two paralegals who worked on this matter are their names and how long they have worked at Plaintiffs' counsels' law group. (See Corrected Declaration of Katherine McDonough ("McDonough Decl.") at ¶ 1.) Without additional information regarding the types of tasks performed, the paralegals' experience, training, and previous rates billed and received, I am not inclined to award such a high rate. I therefore reduce the requested rate to $125 per hour. Otherwise, I find the

requested rates are reasonable.

Regarding the number of hours billed, Plaintiffs' counsel have submitted billing records demonstrating that they spent 927.70 hours litigating this case.[4] These hours comprise time spent litigating this action before and after the appeal. (McDonough Decl. ¶¶ 6-8.) Plaintiffs have provided an itemized accounting of the number of hours spent on each task performed by counsel for which they request reimbursement. (Id.) Defendants argue that Plaintiffs should not be permitted to recover fees for work performed in the pre-appeal phase of this action because Plaintiffs previously requested, and were denied, those fees on account of failing to comply with the meet and confer requirements of the Local Rules. (See Docket No. 54.) Defendants argue that since Plaintiffs did not appeal the order denying their fees, they have waived the right to recover those fees. I agree with Defendants that Plaintiffs have waived their right to recover fees and costs for the pre-appeal phase of this action. If Plaintiffs were entitled to recover those fees it would permit them to revive their original motion for attorneys' fees despite the fact it was denied on account of their failure to comply with the relevant Local Rules. Had Defendants not appealed the original summary judgment order, Plaintiffs would have never been given the opportunity to seek to collect these fees (unless they had appealed the denial, which they did not do),

[4] This figure incorporates a voluntary reduction of 32 hours for worked performed on the second motion for summary judgment related to Plaintiffs' unsuccessful claim for veil piercing.

and it is only by virtue of the action having been remanded that Plaintiffs are now able to even attempt to collect these fees. It is too much of a bootstrap to permit a party who waived a right to fees and did not appeal from that ruling to use an adverse ruling on the merits of an appeal to revive its right to fees. Accordingly, I find that Plaintiffs are not entitled to recover fees or costs for work performed during the pre-appeal phase of this action.

That leaves 256.10 hours of potentially reimbursable time.[5] Of this amount, Plaintiffs seek 204 hours for time spent both drafting and preparing for oral argument on the second summary judgment motion.[6] Defendants argue that the time spent on the second summary judgment motion is excessive given that Plaintiffs' attorneys had already researched and briefed a number of the issues in the parties' motions.

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[5] This number is derived from Plaintiffs' billing records, attached as Exhibit 1 to the McDonough Declaration. The first time entry in these records for the post-appeal phase of this action is on 1/26/2011. This order uses that billing entry as the starting point for determining the total number of post-appeal hours.

[6] In their first motion for summary judgment, Plaintiffs sought reimbursement for 176.69 billable hours related to work performed on the cross-motions for summary judgment. (Docket No. 50.) Plaintiffs now seek reimbursement for a total of 373.50 billable hours for work performed relating to both rounds of the cross-motions for summary judgment. The difference between these two figures, rounded to the nearest hundredth, is 196.80. In their reply brief, however, Plaintiffs' counsel claim to have worked 213.50 hours on the second round of summary judgment. This inconsistency is not addressed by Plaintiffs. I reviewed the billing records and added the hours from each time entry reflecting work performed on the second round of summary judgment briefing, which came to 204 hours. Given the inconsistencies in the briefs, I have chosen to use the 204 hour figure that is supported by the billing records.

Defendants also highlight the similarity in the statements of facts between Plaintiffs' first summary judgment motion and their second motion, pointing out that the statement of facts comprised 11 of the 33 pages in the brief. Plaintiffs' counsel asserts that the second summary judgment brief contained "expanded and revised" facts that shed light on the history of Simas Floor and how M & M was formed, and also included additional research on the alter ego doctrine.

That there is overlap in the legal research and briefing does not mean that the time spent in research and re-drafting was entirely unnecessary or duplicative. This litigation has extended over many years, and it is not unreasonable for Plaintiffs' counsel to spend time conducting legal research to ensure that Plaintiffs' arguments were consistent with the present status of the law. See Moreno v. City of Sacramento, 534 F.3d 1106, 1112 (9th Cir. 2008) ("When a case goes on for many years, a lot of legal work product will grow stale; a competent lawyer won't rely entirely on last year's, or even last month's, research: Cases are decided; statutes are enacted; regulations are promulgated and amended. A lawyer also needs to get up to speed with the research previously performed. All this is duplication, of course, but it's *necessary* duplication; it is inherent in the process of litigating over time.") (emphasis in original). This case also presented some novel issues regarding the alter ego doctrine, which made the legal analysis inherently more complex, particularly given that there was little authority applying the alter ego doctrine to a factual scenario similar

to the one presented in this dispute. Indeed, a great deal of the analysis turned on the historical application of this doctrine in the context of traditional labor disputes, not under the MPPAA.

Nevertheless, 204 hours – which amounts to approximately 5 full-time workweeks – is on the higher end of what I would expect Plaintiffs' counsel to spend on the summary judgment motion presented in this action, particularly since some of the issues had already gone through one round of briefing. It is somewhat difficult to tell from the billing records what precisely consumed so much of Plaintiffs' counsels' time, as many of the records simply state "prepare Summary Judgment Motion" or "further Prepare Summary Judgment Motion." Since 204 hours is on the higher end of the time that I would have expected counsel to spend on this motion, and in light of the vagueness of the billing records, I find that a moderate reduction in the number of hours sought is warranted. I will therefore reduce the hours requested for work relating to the second round of summary judgment by ten percent, for a total of 183.6 hours.[7]

Finally, Defendants argue that Plaintiffs should not be entitled to recover time spent on the July 2011 settlement conference because, in addition to being unreasonable and excessive, Plaintiffs misrepresented their willingness to settle their claims, which resulted in the settlement

[7] Based on the billing records, this will amount to 37.44 reimbursable paralegal hours and 146.16 reimbursable attorney hours.

conference being an "utter waste of time." (Def.'s Opp. Br. at p.13.) I have reviewed Plaintiffs' billing entries related to the July 2011 settlement and am not convinced that Plaintiffs' hours are excessive. I therefore decline to reduce these hours, particularly in light of the high incentive placed on encouraging parties to meaningfully engage in settlement discussions.[8]

Plaintiffs have also submitted billing records showing that in the post-appeal phase of this action they incurred $113.25 in costs for delivering pleadings and other documents to the court. (McDonough Decl. at ¶ 10, Exhs. 2-3.) Plaintiffs are entitled to recover these delivery costs as part of their reasonable attorneys' fees. Trustees of the Construction Industry and Laborers Health and Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1257 (9th Cir. 2006). Plaintiffs also seek to recover costs relating to computerized legal research. In this circuit, reasonable charges for computerized research may be recovered if separate billing for such expenses is "the prevailing practice in the local community." Trs. of the Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co., 460 F.3d 1253, 1258-59 (9th Cir. 2006). Based on the evidence submitted by Plaintiffs, and the challenges to that evidence raised by Defendants, I find that Plaintiffs have failed to meet their burden to show that the recovery of computerized legal research costs is the

[8] I also agree with Plaintiffs' counsel that it is not proper for me to delve into the details of what happened during the settlement conference under the Local ADR Rules.

prevailing practice in this district. While Ms. McDonough's declaration states that "[i]t is the prevailing practice in the Bay Area to bill computerized research charges to the client," no foundation is provided for this conclusory assertion. (McDonough Decl. at ¶ 11.) Defendants provided evidence – unchallenged by Plaintiffs – that it is in fact not the prevailing practice in this district to charge clients for computerized legal research, and that most firms pay a flat monthly rate for these services in lieu of charging clients separately on a "per search basis." (Declaration of Stephen Davenport at ¶¶ 4-6.) Ms. McDonough states that the legal research costs incurred in this case were hourly charges that were in fact billed to the Pension Fund. (Declaration of Katherine McDonough in Support of Reply at ¶ 19.) While this may be the practice of Plaintiffs' counsels' firm, Plaintiffs failed to counter Defendants' evidence that this is not "the prevailing practice" of firms in this district. I therefore decline to award Plaintiffs these costs.

Conclusion

For the reasons set forth above, **IT IS SO ORDERED** that Plaintiffs are awarded $53,900.00. This sum comprises 195.5 attorney hours at a rate of $250 ($48,875) and 40.2 paralegal hours at a rate of $125 ($5,025). Plaintiffs are also awarded $113.25 in costs.

Dated: May 16, 2012

Bernard Zimmerman
United States Magistrate Judge

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